



Victorian Government Stage 4 restrictions – Temporary reduction in staffing levels and employer payment obligations

SUMMARY

There has been some uncertainty about an employer's obligations to pay employees who are temporarily not able to be offered work due to the Victorian Government's Stage 4 restrictions on the number of employees who are permitted to be on a work site in particular industries.

The Fair Work Ombudsman (FWO) has published advice on this issue.

Victorian Government's Stage 4 restrictions

Information and updates about the Victorian Government's Stage 4 restrictions are available on Ai Group's [website](#).

The Stage 4 restrictions have limited the number of employees who are able to work on particular work sites. For example:

- A small-scale construction site in Melbourne is limited to five people plus a supervisor at any one time.
- A large-scale construction site in Melbourne is limited to a daily maximum number of workers on site, calculated as the higher of 25% of their baseline workforce and 5 workers.
- Melbourne warehouse and distribution centre worksites have been required to reduce their daily peak onsite workforce by at least 33% of the daily peak workforce capacity and reduce their daily total onsite workforce by at least 10% of daily total workforce capacity.

Temporary reduction in staffing levels and complying with awards and enterprise agreements

On 31 August 2020, the FWO issued the following advice about the payment obligation of employers when staffing levels have been reduced as a direct result of a Victorian Government direction

“Reducing staffing levels and complying with awards and enterprise agreements

Awards and enterprise agreements include terms about paying full-time and part-time employees for fixed or agreed hours of work and have requirements to consult employees about major workplace change and changes to rosters or hours.

When an employer is required by an enforceable government direction to temporarily reduce staffing levels, they should consider their obligations under an award or enterprise agreement

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and consider the available options, including:

- *agreeing to alternative work arrangements with employees*
- *requesting or directing employees to take leave*
- *relying on temporary changes to workplace laws during coronavirus*
- *standing down employees*
- *changing duties, location or days and times of work under the JobKeeper scheme*
- *seeking employees' agreement to work reduced hours.*

JobKeeper employers

Employers in the JobKeeper scheme who need to reduce staffing levels in order to comply with an enforceable government direction can give their employees:

- *a JobKeeper enabling stand down direction to reduce their hours of work*
- *a JobKeeper enabling direction to change their usual duties or location of work.*

Employers in the JobKeeper scheme can also make agreements with employees to change their days and times of work and take leave in certain circumstances. JobKeeper enabling directions and agreements made under the Fair Work Act JobKeeper provisions apply even if they're inconsistent with terms of an award, enterprise agreement or employment contract.

Employers not in the JobKeeper scheme

Employers who aren't in the JobKeeper scheme may also need to reduce staffing levels in order to comply with an enforceable government direction.

The Fair Work Act provides that awards and enterprise agreements are subject to enforceable government directions under state and territory laws that restrict the performance of work in emergency situations. This means that an enforceable government direction requiring a reduction in staffing levels may override some of an employer's obligations under an award or enterprise agreement. Where this occurs, an employer may be able to reduce employees' hours below those set under an award or enterprise agreement, and not pay employees for the hours they don't work. Other relevant terms of an award or enterprise agreement, such as terms requiring consultation with employees, may also in some circumstances be overridden by the enforceable government direction.

The availability of this option for employers affected by an enforceable government direction has not been tested in the courts and may be subject to competing views. It is only likely to be available to the extent that an enforceable government direction requiring reduced staffing levels makes it reasonably necessary to reduce employees' hours below those ordinarily set under an award or enterprise agreement. This will depend on the circumstances and how the particular award or enterprise agreement interacts with the enforceable government direction. You should consider seeking independent legal advice if you're considering this option.

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Employers can't use this option if they are only indirectly affected by an enforceable government direction. For example, if an employer experiences a disruption to its supply from another business that has been required by an enforceable government direction to close, the employer can't rely on this option to reduce their employees' hours of work.

Employers have some discretion about how they choose to implement reductions in staffing across their workforce. However, under the general protections in the Fair Work Act, employers cannot take adverse action against employees for a prohibited reason, such as the person's race, sex, marital status, pregnancy or union or non-union membership."

Do you require further advice?

For further information or assistance, please contact Ai Group.

Ai Group has set up a [special section on our website](#) to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic.

A handwritten signature in black ink, appearing to read 'S. Smith'.

Stephen Smith
HEAD OF NATIONAL WORKPLACE RELATIONS POLICY